

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SPIROS VARSOS, :

Petitioner, : 98 Civ. 6709 (DAB)(AJP)

-against- :

LEONARD PORTUONDO, : REPORT AND

Superintendent, : RECOMMENDATION

Respondent. :

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ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Deborah A. Batts, United States District Judge:

Petitioner Spiros Varsos seeks a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, from his 1988 conviction of second degree murder. (Pet. ¶¶ 1-4.) See also People v. Varsos, 182 A.D.2d 508, 582 N.Y.S.2d 193 (1st Dep't), app. denied, 80 N.Y.2d 911, 588 N.Y.S.2d 836 (1992) (table). Varsos's habeas petition alleges ineffective assistance of appellate counsel. (Pet. ¶ 12(A).)

For the reasons set forth below, I recommend that the Court deny Varsos's petition as untimely under the one-year limitation period imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").

PROCEDURAL BACKGROUND

Petitioner Varsos's habeas petition is dated July 30, 1998, and was received by the Eastern District's pro se office on August 7, 1998 and this Court's pro se office on August 17, 1998. (See Pet. at pp. 1, 7.) Since any of those three dates render the Petition untimely as explained below, the Court will use the July 30, 1998 date for purposes of this opinion.

Varsos was convicted in Supreme Court, New York County on October 18, 1988 of second degree murder and sentenced to twenty-three years to life imprisonment. (Pet. ¶¶ 1-4.) The First Department affirmed Varsos's conviction on direct appeal on April 16, 1992, and the New York Court of Appeals denied leave to appeal on August 14, 1992. People v. Varsos, 182 A.D.2d 508, 582 N.Y.S.2d 193 (1st Dep't), app. denied, 80 N.Y.2d 911, 588 N.Y.S.2d 836 (1992) (table).

On April 29, 1996, represented by retained counsel, Varsos filed a collateral attack in state court pursuant to N.Y. C.P.L. § 440.10. (Varsos 10/6/98 Aff. at p.1; State Ans. ¶ 9 & Ex. E: Varsos § 440.10 Motion.) The trial court denied the motion on August 7, 1996, and leave to appeal to the First Department was denied on December 5, 1996. (State Ans. ¶ 9 & Ex. G: 8/7/96 Schlesinger Op.; State Ans. Ex. J: 12/5/96 1st Dep't Order; see also Varsos 10/6/98 Aff. at p. 1.)

On December 23, 1997, Varsos filed an application for a writ of error coram nobis in the First Department, alleging ineffective assistance of appellate counsel on his direct appeal. (State Ans. ¶ 10 & Ex. H: Varsos Coram Nobis Motion Papers; Varsos 10/6/98 Aff. at p. 1.) The First Department denied that application on July 2, 1998. (State Ans. ¶ 10 & Ex. M: 7/2/98 1st Dep't Order; Varsos 10/6/98 Aff. at p. 2.)

As noted above, Varsos filed his present habeas petition on or about July 30, 1998. On September 23, 1998, Chief Judge Griesa ordered Varsos to show cause why his petition was not barred by the AEDPA's one-year limitation period. (Dkt. No. 2: 9/23/98 Order.) Varsos responded,

relying on his state collateral attacks. (Dkt. No. 3: Varsos 10/6/98 Aff. at pp. 1-2.)

ANALYSIS

THE AEDPA'S STATUTE OF LIMITATIONS BARS VARSOS'S PETITION

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act. The AEDPA, inter alia, instituted a one-year statute of limitations for habeas petitions filed after April 24, 1996:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. . . .

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(1)-(2).

Because the First Department affirmed Varsos's conviction on April 16, 1992, and the New York Court of Appeals denied leave to appeal on August 14, 1992, Varsos's conviction became final on November 14, 1992,

“when his time to seek direct review in the United States Supreme Court by writ of certiorari expired.” Ross v. Artuz, 150 F.3d 97, 98 (2d Cir. 1998). Because Varsos’s conviction became final in 1992, he had a full year from the April 24, 1996 enactment of the AEDPA to file his habeas petition. See Ross v. Artuz, 150 F.3d at 98.

There appears to be a split of authority within the Southern District as to whether state collateral attacks toll the one-year statute of limitations under Ross v. Artuz for convictions that became final before April 24, 1996.^{1/} The Court need not decide that question here, however, because even if collateral attacks toll the Ross v. Artuz one-year after April 24, 1996 limitations period, Varsos’s petition still was untimely.

^{1/} Compare, e.g., Lovasz v. Vaughn, 134 F.3d 146, 149 (3d Cir. 1998); Duncan v. Griener, 97 Civ. 8754, 1999 WL 20890 at *3 (S.D.N.Y. Jan. 19, 1999) (Koeltl, D.J.) (tolling provision in 28 U.S.C. § 2244(d)(2) applies to petitioner whose conviction became final before the AEDPA’s April 24, 1996 effective date); Turner v. Senkowski, No. 97-CV-653, 1998 WL 912011 at *2 (W.D.N.Y. Nov. 23, 1998) (tolling Ross’s one year after AEDPA enactment period for state collateral review, following Joyner); Joyner v. Vacco, 97 Civ. 7047, 1998 WL 633664 at *2 (S.D.N.Y. Sept. 15, 1998) (Cote, D.J.) (applying collateral motion toll to one year period after AEDPA’s enactment); with, e.g., Cole v. Kuhlmann, 5 F. Supp. 2d 212, 213-14 (S.D.N.Y. 1998) (tolling provision in § 2244(d)(2) does not apply where the conviction became final before the AEDPA’s effective date; Cole, however, was decided under the Peterson v. Demskie “reasonable time” doctrine before the 2d Cir.’s Ross decision).

Section 2244(d)(2) does not state that the AEDPA's one-year statute begins to run anew after decision on a state collateral attack; such an interpretation would allow an inmate to avoid the effect of the AEDPA's one-year statute of limitations by bringing a belated state collateral attack. See, e.g., Cromwell v. Keane, 33 F. Supp. 2d 282, 285 (S.D.N.Y. 1999) (Rakoff, D.J. & Peck, M.J.).

Rather, § 2244(d)(2) merely excludes the time a collateral attack is under submission from the calculation of the one-year statute of limitations. See, e.g., Brooks v. Artuz, 98 Civ. 4449, 1999 WL 138926 at *2 (S.D.N.Y. March 15, 1999) (“The tolling provision [in 28 U.S.C. 2244(d)(2)] does not . . . ‘revive’ the limitations period (i.e., restart the clock at zero); it can only serve to pause a clock that has not yet fully run.”) (quoting Rashid v. Khulmann, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)); Cowart v. Goord, 97 Civ. 3864, 1998 WL 65985 at *2 (S.D.N.Y. Feb. 18, 1998) (Sotomayor, D.J.) (“the filing of a proper state collateral petition does serve to toll (but not start anew) the AEDPA statute of limitations”); Hughes v. Irvin, 967 F. Supp. 775, 778 (E.D.N.Y. 1997) (petitioner’s statute of limitations period was suspended only during the period state collateral motions were pending, and began to run again, but not anew, when the state collateral motions were decided). The

period that Varsos's CPL § 440.10 motion was pending, from April 29, 1996 to December 5, 1996 – a total of 220 days – is excluded from the post-April 24, 1996 one-year period. Thus, Varsos had a total of 365 days plus 220 days from April 24, 1996 to file his petition, i.e., he had to file his petition by November 30, 1997 (but since that was a Sunday, he had until December 1, 1997). Because Varsos's coram nobis application was not filed until December 23, 1997, the one-year period had already run and was not further extended by the untimely coram nobis application.^{2/}

CONCLUSION

For the reasons set forth above, I recommend that Varsos's petition be denied as untimely under the AEDPA.

^{2/} Looked at another way, Varsos's petition was filed on July 30, 1998, 827 days after April 24, 1996. Unless the pendency of Varsos's two state collateral attacks were to reduce that period to 365 days or less, the petition is untimely. The CPL § 440.10 motion was pending for 220 days, and the coram nobis petition was pending from December 23, 1997 to July 2, 1998 – 191 days; both thus result in a tolling period of 411 days. But the tolling period would have to be 462 days (827 minus 365) to make the petition timely.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Deborah A. Batts, 500 Pearl Street, Room 2510, and to the chambers of the undersigned, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Batts. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822, 115 S. Ct. 86 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S. Ct. 825 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy

v. Manson, 714 F.2d 234, 237-38 (2d Cir.1983); 28 U.S.C. § 636(b)(1); Fed. R. Civ.

P. 72, 6(a), 6(e).

DATED: New York, New York
April 12, 1999

Respectfully submitted,

Andrew J. Peck
United States Magistrate Judge

Copies to:

Spiros Varsos
Mark Dwyer, Esq.
Judge Deborah A. Batts